Nos. 18-1685/18-1706

In the United States Court of Appeals for the Sixth Circuit

AIRGAS USA, LLC,
Petitioner Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent Cross-Petitioner.

On Appeal from the National Labor Relations Board

BRIEF OF PETITIONER CROSS-RESPONDENT

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ORAL ARGUMENT REQUESTED

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 18-1685/18-1706 Case Name: Airgas USA LLC v. National Labor Relations Board

Name of counsel: Michael C. Murphy

Pursuant to 6th Cir. R. 26.1, Airgas USA, LLC
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Airgas USA, LLC is a wholly owned subsidiary of Airgas, Inc.; Airgas, Inc. is an indirect wholly owned subsidiary of L'Air Liquide S.A., which is a public company whose shares are listed on the Paris Euronext stock exchange. Airgas, Inc. has no other "grandparent" or "great grandparent" corporations that are publicly traded.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on September 17, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Michael C. Murphy

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This appeal concerns the evidentiary standards required under the *Wright Line* analysis in Section 8(a)(4) discrimination case. Airgas respectfully states that oral argument should be heard in this case to ensure the Court has a full opportunity to understand the facts, legal issues and consequences of the National Labor Relations Board's Decision in *Airgas USA, LLC, 366 NLRB No. 92*, slip op. (2018). (Addendum ("Add.") 727).

STATEMENT OF JURISDICTION

This case involves the enforceability of an Order of the National Labor Relations Board ("the Board") finding that Airgas USA, LLC ("Airgas" or "the Employer") violated the National Labor Relations Act, 29 USC §§ 151 et. seq. (2012) ("NLRA" or "the Act") when Airgas determined that employee Steven W. Rottinghouse, Jr. ("Rottinghouse") was ineligible to receive holiday pay for the 2016 Thanksgiving Holiday. The Board has jurisdiction over the underlying matter pursuant to 29 U.S.C. § 160(a). The Board's order is a "final order" under 29 U.S.C. §§ 160(e) and (f) that disposes of all claims.

Airgas filed a petition for review of the Board's order on June 14, 2018; the Board filed a cross-application for enforcement on June 21, 2018. The Court has jurisdiction over Airgas's petition for review under 29 U.S.C. § 160(f), and it has jurisdiction over the Board's cross-application for enforcement under 29 U.S.C. § 160(e), because the unfair labor practice occurred in this circuit, and because Airgas transacts business in this circuit.

STATEMENT OF ISSUES

Whether the Board's finding that Airgas unlawfully withheld holiday pay from Steven W. Rottinghouse, Jr. ("Rottinghouse") is supported by substantial evidence based on a correct application of the law, where neither the Board nor the administrative law judge considered (a) whether the alleged inferred animus against protected activity was causally linked to the Employer's holiday pay determination, or (b) whether Airgas would have made the same eligibility determination even in the absence of Rottinghouse's alleged protected activity.

STATEMENT OF THE CASE

I. Factual Background

From its industrial fill plant located at 10031 Cincinnati-Dayton Road in Cincinnati, Ohio ("Cin-Day Plant"), Airgas employs a team of union-represented delivery drivers to distribute packaged gases (cylinders and canisters). (App. 444). Todd Allender, a 27-year Airgas veteran, is the current Plant Manager. (App. 142, 167). He reports to Dave Luehrman, the Facility Manager of the Cin-Day Plant. (App. 143, 199). Allender is responsible for tracking attendance. (App. 141-143, 199-200). Luehrman is responsible for payroll and collecting medical documentation from employees upon their return from unexpected absences. (App. 143, 170-172, 199).[1] Because Article III, Section 3 of the Cin-Day Plant's Collective Bargaining Agreement ("CBA") conditions holiday pay eligibility on reporting to work on scheduled

[1] Leuhrman reports to Clyde Froslear ("Froslear"), the Operations Manager for a region that encompasses the Cin-Day plant. (App. 486-487, 566). Froslear splits his time between three plants (App. 486-487, 709), is not involved in the administration of the Holiday Pay provision of the CBA (App. 183), and is not involved in attendance tracking or payroll. (App. 141-143, 170-172, 199-200).

workdays adjacent to holiday periods, both Allender (tracking attendance) and Leurhman (payroll, medical absences) administer this part of the CBA. (App. 141-143, 170-172, 199-200, 448-449, 688).

During negotiations for the current CBA, the parties did not modify the long-standing holiday pay provision. (App. 101-106, 448, 688). The operative term in this mature CBA provision is "scheduled work day."[2] To qualify for Holiday Pay, an employee must work the last scheduled work day preceding a holiday and the first scheduled work day following the holiday. (App. 182-190, 448, 688). Article III, Section 3 of the CBA only allows for one exception to this rule: where an employee produces documentation from a health care provider that an injury or illness caused the unexpected absence. (App. 201-203, 448, 688).[3]

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[2] During negotiations for the current CBA, the Employer successfully bargained for a new attendance policy that became effective on January 1, 2017. (App. 135, 207, 209). The new attendance policy introduced the terms "excused absence" and "unexcused absence." (App. 467).During the hearing Rottinghouse revealed significant confusion over these terms. (App. 99-100, 103-106).

[3] A previously scheduled day off – whether a vacation day, a floating holiday or a personal day – is not defined as a "scheduled work day" because it is a "scheduled day off." (App. 163-164, 182-190, 193-194). Associates do not have to schedule personal days in advance but they must call at least one hour before their shift to use one to avoid discipline and to cover income for the unexpected call-out. (App. 194,

By operation of Article III of the CBA, Rottinghouse became ineligible for Thanksgiving holiday pay when he unexpectedly did not report to work on Wednesday, November 23, 2016, his last scheduled work day prior to the Thanksgiving holiday. (App. 49, 193-194, 448-449).

449, 462). Some of the Board's incorrect findings appear to have been caused by both the General Counsel and the ALJ misapprehending how the CBA's holiday pay (Article III in old CBA, Article III, Section 3 in new CBA) and the personal day (Article III in old CBA, Article III, Section 6 in new CBA) provisions coexist. (App. 163-166, 448-449, 688).

II. Procedural History

On December 8, 2016, shortly after learning that he had not received holiday pay for the two-day Thanksgiving holiday, Mr. Rottinghouse filed an unfair labor practice charge Board alleging violations of Sections 8(a)(3), (4) and (1) of the Act. (App. 237). On March 20, 2017, Rottinghouse filed an amended charge, which dropped the 8(a)(3) allegation. (App. 236). The General Counsel then proceeded to Complaint on a single allegation: that Airgas violated Section 8(a)(4) and (1) of the Act by refusing to pay Rottinghouse holiday pay for the 2-day Thanksgiving holiday in 2016 in retaliation for his charge-filing activities. (App. 228).

A hearing was held in Cincinnati, Ohio on June 1, 2016 before Administrative Law Judge Melissa M. Olivero ("the ALJ"). (App. 708). The ALJ issued a decision on May 21, 2017 in which she found that Airgas violated Section 8(a)(4) and (1) of the Act by determining Rottinghouse was ineligible for Thanksgiving holiday pay. (App. 708-724). Airgas filed exceptions and a supporting brief on August 4, 2017. (App. 727, 738-744). On May 21, 2018 a three-member panel of the

Board issued an order adopting the ALJ's findings and conclusions. (App. 727-728). The Board also emphasized that its rationale for adopting the ALJ's conclusions was based on the absence of any evidence that Airgas had ever denied holiday pay to an employee, other than Rottinghouse, who "took a personal day immediately before or after the holiday." (App. 727). Airgas filed a petition for review on June 14, 2018. (App. 745). The Board subsequently filed a cross-application for enforcement on June 21, 2018. (App. 748).

For these reasons, as discussed more fully below, the Court should grant Airgas's petition for review and deny the Board's cross-application for enforcement.

SUMMARY OF THE ARGUMENT

This Court should reverse the May 21, 2018 Order of the National Labor Relations Board and dismiss the Complaint. In adopting the Decision of the Administrative Law Judge, the Board ignored crucial parts of the record, misapprehended facts and misapplied the law to the facts of the record.

Rottinghouse did not receive holiday pay for the 2016 Thanksgiving Holiday because the collective bargaining agreement between Airgas and Rottinghouse's Union mandates that for an employee to receive holiday pay that employee must work the last scheduled work day immediately preceding the holiday and the first scheduled work day after the holiday. (App. 182-190, 448, 688). The record shows that the General Counsel failed to show that the Employer's holiday pay determination was in any way motivated by union animus. The ALJ only found otherwise by fundamentally misapprehending the record, particularly how the CBA's holiday pay and personal day provisions coincide. (App. 163-164, 182-190, 193-194, 288, 443, 711-713, 715-717).

ARGUMENTS

I. Standards of Review

The Sixth Circuit reviews the Board's factual determinations and application of the law to those facts under a substantial-evidence standard. *Caterpillar Logistics, Inc. v. NLRB*, 835 F.3d 536, 542 (6th Cir. 2016). The substantial evidence standard is met "if a reasonable mind might accept the evidence as adequate to support a conclusion." *Kellogg Co. v. NLRB, 840 F.3d 322* (6th Cir. 2016). *See also Dupont Dow Elastomers, LLC v. NLRB*, 296 F.3d 495, 500 (6th Cir. 2002) ("if the record viewed as a whole provides sufficient evidence for a reasonable fact finder to reach the conclusions the Board has reached . . .").

This relatively deferential standard does not, however, "permit the Board to ignore relevant evidence that detracts from its findings." *GGNSC Springfield LLC v. NLRB*, 721 F.3d 403, 407 (6th Cir. 2013). Indeed, the 6th Circuit requires itself to examine evidence in the record that runs contrary to the Board's findings and conclusions. *NLRB v. Seawin, Inc.*, 248 F.3d 551 (6th Cir. 2001) ("However, this court must review evidence in the record that runs contrary to the Board's findings and conclusions."). Finally, the Sixth Circuit will overturn credibility

determinations "if they overstep the bounds of reason" or "are inherently unreasonable or self-contradictory." *Caterpillar Logistics*, 835 F.3d at 542.

II. The Credibility Determinations Adopted by the Board are Inherently Unreasonable and Self-Contradictory

The ALJ's credibility determinations are inherently contradictory. First, she finds that "Froslear has no role in determining whether an employee will be paid or not be paid for a holiday" (App. 183, 712). Then, the ALJ concludes that she will draw negative inferences against Airgas due to Airgas's "failure to present the testimony of a *decision maker* as to his motive in taking the alleged discriminatory action." (App. 714-715 emphasis added).

III. Finding of Disparate Impact Not Supported By Substantial Evidence

Similarly, the General Counsel failed to present evidence of disparate treatment in the Employer's administration of the Holiday Pay provision contained in Article III, Section 3 of the parties' collective bargaining agreement. But the ALJ made a finding of disparate treatment anyway, and this is where things get interesting.

Allender and Luerhman's unrebutted testimony and exhibits in the record illustrate that the only way an employee could call off unexpectedly right before or right after a holiday and still receive holiday pay is if they brought in medical documentation from their health care provider. (App. 170-172, 202-203, 288, 443, 448, 688). This illustration is entirely consistent with the plain meaning of the contract language contained in Article III, Section 3 of the parties' CBA. (App. 448). But it is not for Airgas to prove the opposite of disparate impact. The General Counsel faces the burden of production under the *Wright Line* analysis and the General Counsel steadfastly refused to elicit testimony regarding medical documentation, presumably because this provision of the holiday pay section of the CBA did not square with his theory of this case. (App. 149, 288, 443).

As a result, the Board erroneously found that the Employer had a past practice of paying holiday pay to employees who took an unscheduled personal day either right before or right after a holiday: "We additionally emphasize that there is no evidence that prior to this incident the Respondent had ever denied holiday pay when he or she took a personal day immediately before or after the holiday." (App. 727).

Yet the record evidence contains substantial unrefuted testimony that employees who take unscheduled personal days right before or right after a holiday are not eligible to receive holiday pay. (App. 163-164, 170-172, 182-190, 193-194, 202-203). And, as one example, the record demonstrates that Dennis Hibbard called off on November 28th and did not get paid for the 2016 Thanksgiving holiday. (App. 288). Allender's unrefuted testimony demonstrates that the employer erroneously administered the holiday provision of the CBA only once in more than three years. (App. 189-190).

IV. The Board Failed to Consider Whether Allender and Luerhman Would Have Made the Same Determination in the Absence of Alleged Protected Activity

There is no evidence in the record that either Allender or Luerhman harbored animus towards Rottinghouse or his filing of unfair labor practice charges. Indeed, shop steward Perkins testified that neither Allender nor Luerhman have ever been accused of unlawful discrimination by the union or any of the employees. (App. 137-138). Testifying under sequestration, each of them gave accounts consistent with the other regarding how they administer Article III, Section 3 of the CBA. (App. 141-197, 202-203).

Indeed, if Allender and Luerhman administered the holiday pay the way the Board concludes they did, they would be committing an ongoing violation of Article III, Section 3 of the CBA. (App. 448). Finally, the unrefuted testimony of Allender and Luerhman demonstrates that the employer erroneously administered the holiday provision of the CBA only once in more than three years. (Tr. 189-190).

V. An 8(a)(4) Discrimination Allegation Requires the General Counsel to Prove a Nexus Between an employee's protected activity and the adverse employment action

As the Board held in *Newcor Bay*, an 8(a)(4) allegation of employment discrimination must be analyzed under the Board's *Wright Line* decision where the burden is on the General Counsel to establish the following four elements by a preponderance of the evidence: the existence of protected activity, knowledge by the employer of that protected activity, an adverse employment action, and "a link, or nexus, between the employees' protected activity and the adverse employment action." *Newcor Bay City*, 351 NLRB 1034 (2007). See *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Rottinghouse is not immune from the terms of the parties' collective bargaining agreement simply because he engaged in

protected activity. *See, e.g., Overnight Transportation Co.*, 254 NLRB 132, 154 (1981) ("The fact that [alleged discriminatee] was . . . active on behalf of the Union does not grant him immunity from discipline for non-discriminatory reasons.").

The Board's Decision rests largely on the ALJ's erroneous inferential findings based off of two statements supposedly made by regional Operations Manager Clyde Froslear. First, the ALJ erred by characterizing Froslear's statements as "maligning" Rottinghouse's Board activity. (App. 715). To the contrary, the record evidence shows that one comment, made two years prior, was, at worse, confusing, since not even the shop steward recalled anything "maligning" about it. (App. 128-130, 702-707). The other comment, delivered in the back-and-forth of a grievance meeting, at worst evidences that Froslear was frustrated with Rottinghouse's seemingly meritless serial grievance and Board filing activity. (App. 133-34).[4]

[4] The Board has previously found that such comments, made in the context of the contentiousness borne by healthy industrial relations, do not amount to animus. *Sysco Food Servs. of Cleveland, Inc.*, 347 NLRB 1024, 1038 n.26 (2006) (finding that "[t]he Act does not require a front-line supervisor to like getting grievances," and "[s]uch frustration is potentially a catalyst for unlawful animus, but it does not amount to

Most significantly, even assuming for the sake of argument that these two comments substantiate some level of inferred generalized animus, the General Counsel failed to identify any evidence linking Froslear to the specific employment action (the holiday pay determination). *FiveCAP, Inc. v. NLRB*, 294 F.3d 768 (6th Cir. 2002) (burden remains with the General Counsel to demonstration causal connection through particularized showing after burden shift that employer "nonetheless" acted on the basis of unlawful animus); *JS Mechanical, Inc.*, 341 NLRB 353, 354 n.7 360 (2004) (even assuming one supervisor harbored anti-union animus, General Counsel still would have failed to show that those antiunion feelings contributed to the decision not to hire employees given different managers were responsible for their hiring); *Brown & Root Indus. Servs.*, 337 NLRB 619 (2002) (statement of supervisor not involved in hiring decisions do not support an inference that the respondent's hiring decisions were motivated by union animus).

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evidence of it. A vital collective-bargaining relationship frequently, perhaps necessarily, will involve some contention and frustration with the other side.").

CONCLUSION

Rottinghouse did not receive holiday pay for the 2016 Thanksgiving Holiday because Article III, Section 3 of the Collective Bargaining Agreement mandates that to receive holiday pay, an employee must work the regularly scheduled work day immediately preceding and immediately following a holiday. He was not denied holiday pay in retaliation for his charge-filing activities. The Board's findings to the contrary are based on misapprehensions of the record, flawed reasoning and misapplication of the law. Consequently, the Court should grant Airgas's petition for review and deny the Board's cross-application for enforcement of its order against Airgas.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) because this brief contains 2,673 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 6 Cir. R. 32(b)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I certify that on the 17th day of September 2018, pursuant to 6 Cir. R. 25, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all parties indicated on the electronic filing receipt.

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